Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1229

ETTA LEE KELLNER,

Petitioner.

VERSUS

KARNES CITY INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Karnes City Independent School District
M. E. Asman, D. R. Luthringer
and Mary Ahrens

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO.

MS. ETTA LEE KELLNER,

Petitioner,

VERSUS

KARNES CITY INDEPENDENT SCHOOL DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF TEXAS, ET AL.,

Respondents.

RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Karnes City Independent School District, M. E. Asman, D. R. Luthringer and Mary Ahrens, hereinafter referred to as Respondents, respectfully pray that Petitioner, Etta Lee Kellner's Petition for Writ of Certiorari be denied and for reason would respectfully show:

I.

QUESTION PRESENTED

The question presented for review herein is: Whether the Trial Court correctly found that under the undisputed facts of the record that Petitioner was not entitled to any relief as a matter of law.

II.

FACTS

Respondents would make the following additions and corrections to the Statement of Facts contained in Petitioner's Statement of Facts. Respondents would first note that the colloquy between the President of the School Board and Mr. Watts, counsel for Petitioner, quoted at pages 6-7 of Petitioner's Petition for a Writ of Certiorari, was not a part of the record before the Trial Court at the time Respondent's Motions for Summary Judgment were granted. Furthermore, the facts alleged at pages 4-5 of her Petition under the title "Events Leading Up To Her Termination" were included nowhere in the record before the Trial Judge.

The record before the Trial Court revealed that Petitioner had been employed as a teacher by the Karnes City Independent School District for a number of years under a series of one year contracts. In the spring of 1975, it was decided by the Board of Trustees not to renew her contract. Later in the year, the Karnes City Independent School District, by letter from the School Board President, James McClane, offered Petitioner a procedurally correct hearing. In his affidavit in support of Respondent's Motion for Summary Judgment, Mr. McClane stated:

"Furthermore, I, James A. McClane, on or about July 25, 1975, wrote a letter to Ms. Etta Lee Kellner, and placed the same in the United States Mails, notifying her of the foregoing reasons for the non-renewal of her contract for the 1975-1976 school year with the Karnes City Independent School District, and at that time offered her a hearing concerning the decision of the Board of Trustees of the Karnes City Independent School District to not offer her a contract for the 1975-76 school year. In said letter, I informed Ms. Kellner that certain individuals, named therein, would probably testify at the hearing concerning the above charges, and requested that Ms. Kellner advise the Board of Trustees in writing, within fifteen (15) days from receipt of said letter if she desired to have a hearing concerning the Board's decision to not offer her a contract for the 1975-76 school year. Ms. Kellner has not made a response to said letter to date."

Rather than respond to this offer of a hearing, Petitioner sued Respondent on August 4, 1975 alleging violations of both substantive and procedural constitutional rights.

III.

ARGUMENT AND AUTHORITIES

QUESTION RESTATED

WHETHER THE TRIAL COURT CORRECTLY FOUND THAT UNDER THE UNDISPUTED FACTS OF THE RECORD THAT PETITIONER WAS NOT ENTITLED TO ANY RELIEF AS A MATTER OF LAW.

Respondents urge that the error of Petitioner's legal theory is demonstrated by the way in which she phrased the issue before this Court.

> "*Whether Petitioner Kellner has sufficiently stated a prima facie case* of a denial of her constitutionally protected 'property' and 'liberty' interests by the Karnes City Independent School District, et al, so as to avoid an adverse preemptory Summary Judgment as a matter of law." [emphasis added]

If simply "pleading" or "stating" a cause of action was sufficient to defeat a summary judgment, a Rule 12 F.R.C.P. Motion to Dismiss and a Motion for Summary Judgment under Rule 56 F.R.C.P. would be indistinguishable. Petitioner totally failed to raise any fact issue by affidavit or other manner which would support her claims of constitutional deprivations.

Petitioner complains that the Trial Court erroneously held that she had not sought the proper remedy, i.e., a procedurally correct hearing rather than reinstatement and back pay. The authority for the Trial Court's holding is *Perry v. Sindermann*, 408 U.S. 593, 603 (1972).

> ". . . Proof of such a property interest *would not of course, entitle him to reinstatement.* But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency."

Petitioner's reliance upon the recent decision in *Mt. Healthy City Board v. Doyle*, _____ U.S. _____, 50 L. Ed. 2d 471 (1977) is misplaced in that it dealt with the issue of a teacher's non-renewal for alleged constitutionally impermissible reasons rather than a procedurally deficient non-renewal of a teacher.

The differences in reasons for the invalidity of a teacher's non-renewal clearly explains the different remedies allowed the injured party.

Petitioner never contraverted the fact that she was offered the opportunity for a full hearing prior to filing suit and before she had suffered any damage through the loss of pay. To uphold Petitioner's claimed cause of action, the Court would have to allow her to refuse an offer of a procedurally correct hearing and then allow her to sue for not being given a procedurally correct hearing and thereby recover any back pay that accrues while the suit is in litigation.

Petitioner failed to submit any evidence by way of affidavit or other permissible form to support her Complaint's conclusionary allegations of (1) denial of constitutionally impermissible reasons for her nonrenewal, or (2) that her reputation was sufficiently injured to constitute a property right entitling her to a procedurally correct hearing. Such a failure to raise any legitimate fact issue left the Trial Court with no alternative but to grant Respondent's Motion for Summary Judgment.

WHEREFORE, PREMISES CONSIDERED, Respondents pray that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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William T. Armstrong, III

ATTORNEYS FOR RESPONDENTS
KARNES CITY INDEPENDENT SCHOOL
DISTRICT, M. E. ASMAN, D. R.
LUTHRINGER AND MARY AHRENS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument was mailed, this 1st day of April, 1977, certified, return receipt requested, postage prepaid to:

Mr. Larry Watts
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Mr. J. Michael Myers
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Ralph Langley per m.a.s.
Ralph Langley